No. 2584

United States

Circuit Court of Appeals

For the Ninth Circuit.

POLSON LOGGING COMPANY, a Corporation,
Plaintiff in Error,

vs.

GUSTAVE H. NEUMEYER and ABRHAM J. DIMOND, Copartners Doing Business Under the Name and Style of NEUMEYER & DIMOND,
Defendants in Error.

Reply Brief of Plaintiff in Error

Bridges & Bruener,
Attorneys for Plaintiff in Error.

Postoffice Address: Aberdeen, Wash.

World Press

No. 2584

United States
Circuit Court of Appeals
For the Ninth Circuit.

POLSON LOGGING COMPANY, a Corporation,
Plaintiff in Error,
vs.
GUSTAVE H. NEUMEYER and ABRHAM J. DIMOND, Copartners Doing Business Under the Name and Style of NEUMEYER & DIMOND,
Defendants in Error.

Reply Brief of Plaintiff in Error

I.

In the case of Roehm vs. Horst, 178 U. S. p. 1; 44 Law Ed. p. 953, the Supreme Court of the U. S. quotes with approval the opinion of Cockburn, Chief Justice, in Frost vs. Knight, L. R. 7 Exch. 111, as follows:

> "The law with reference to a contract to be performed at a future time, where the party

bound to performance announces prior to the time his intention not to perform it, may be thus stated: The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as the wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, * * *."

The opinion of Cokburn, Chief Justice, is but a statement of the general law and finds support in all of the decided cases where an action is brought by the seller on the theory of an executed contract.

The cases cited on pages 11 and 12 of our opening brief are in point. See also:

Inman vs. Elk Cotton Mills, 92 S. W., p. 760.
9 Cyc., p. 637.

North Shore Lumber Co. vs. South Side Lumber Co., 176 Ill. App. 96.

Pate vs Ralston 5 L. R. A. (

The cases cited, therefore, by counsel for defendants in error, on pages 40, 41, 42, 43 and 44 of their brief, to the effect that a tender need not be made where it is clear that the same will not be accepted, are not in point. These cases would be in point were this a suit for breach of an executory contract; but defendants in error having elected to sue on the contract itself, not for damages but for the purchase price, it is an essential part of their case to prove that they delivered or tendered a delivery of the goods called for by the contract. This proposition seems so plain that further argument is unnecessary.

Counsel for defendants in error in the oral argument, as well as in their brief, assert that we are making a new defense in this court. Counsel may have failed to appreciate the validity and seriousness of the defense we did make in the District Court, but such fact furnishes no argument in support of the theory that we are now making a new defense. Defendants in error alleged that we gave them and that they accepted from us, a certain order for goods, wares and merchandise, a copy of which was attached to the complaint as Exhibit "A," of the agreed and reasonable value of $3,895.39, and that they, the said defendants in error, thereafter delivered to plaintiff in error said goods, wares and merchandise in accordance with said order, at Hoquiam, Washington. (Rec. p. 4.) The answer denies each and every allegation, matter, statement and thing of Paragraph 4 of the complaint. (Rec. p. 7.) The plead-

ings, therefore, squarely and clearly put in issue, not only the giving of the order, but also the delivery thereof in accordance with the order. Furthermore, in our opening statement to the jury, a portion of which opposing counsel have quoted in their brief, we said:

> "In addition, we will prove to you, or attempt to prove to you, that even assuming that this order was obtained from Mr. Shaw in good faith, that then we are not liable for this steel because the plaintiff himself has not complied with the contract."

Thereafter, and as a part of our defense, we offered the testimony of Mr. Geo. J. Flurshutz (Rec. p. 31), the testimony of Geo. A. Mills (Rec. p. 58), the testimony of Robt. Gillispie (Rec. p. 53), and Defendant's Exhibits "C", "D", "G" and "H" (Rec. pp. 132, 150, 168, 169). Exhibits "C", "D" and "H" show the results of the work of Mr. Flurshutz and Mr. Mills in a careful examination of this steel. It will be remembered that they actually measured each bar, and the exhibits show the length of each bar. Exhibit "G", which is the summary prepared by Mr. Gillispie, (Rec. p. 168), shows the number of feet of steel of each kind ordered, the length actually shipped and the difference in length between that ordered and that shipped. Furthermore, Defendant's Exhibit "E" shows the approximate length of each bar of steel.

Can anything be plainer but that we contended and contended strenuously at the trial in the lower court, that each bar of steel, with the exception of the last item on the order, should be twenty feet long, cut in two, and no longer? For opposing counsel now to contend that we are raising a new defense in this court, seems to be rather a confession of ignorance.

At this point we desire to call attention to Defendant's Exhibit "E", (Rec. p. 164), which is supposed to be a copy of the invoice sent by defendants in error to plaintiff in error. The original invoice, being Defendant's Exhibit "F", is shown on page 166 of the Record, and it will be noted that in the copy introduced as Defendant's Exhibit "E", there has been added the approximate weight per foot of each kind of steel shipped, as well as the approximate length of the total number of bars of each particular kind of steel, and the approximate length per bar of each particular kind of steel. The original exhibits are with the Clerk of this Court, and it was stated by the writer of this brief, in the oral argument, that Defendant's Exhibit "E" was prepared for the writer's individual use and that the additions to said original invoice had been placed on the copy after the work of Mr. Flurshutz and Mr. Mills had been completed, and that plaintiff in error never received Defendant's Exhibit "E" from defendants in error. This explanation was made by the writer, with the consent and approval of Mr. Anderson, one

of the counsel for defendants in error, and is made because Mr. Anderson in writing his brief, erroneously assumed that Exhibit "E", containing as it does the approximate weight per foot and the approximate length per bar of the steel shipped, had been sent by defendants in error to plaintiff in error at the time of the shipment of the steel. Counsel for defendants in error refer to Exhibit "E" on pages 5 and 19 of their brief. We hope that it is clear to the court, from this explanation, that the only invoice sent by defendants in error to plaintiff in error, is Defendant's Exhibit "F", (Rec. p. 166), and that neither this invoice nor the bills of lading contain any reference, in any way, to either the length of the bars or to the weight thereof.

Opposing council, on page 20 of their brief, accuse us of taking the answers of Mr. Sulcove from their natural setting, to prove that each bar of steel should be twenty feet long, cut in two. It is true that we did not quote all the testimony of Mr. Sulcove in our opening brief, and we respectfully refer the court to the entire testimony of Mr. Sulcove, on the question of the length of the bars, found on page 20 of the record.

Counsel, to get away from the logic and force of our argument that all of the bars should be twenty feet long, apparently take two different and inconsistent positions. On page 21 of their brief they say:

> "The only logical inference to be drawn from the written contract is that all bars twenty feet or more in length should be cut in two, and so they were, etc."

On page 23 of their brief they say:

> "Giving full force and credit to a literal interpretation of this testimony by Sulcove it establishes this: That the dog-hook steel should be ten feet long, or literally twenty feet cut in two. It is limited to dog-hook steel, and has no application to all the other bars of this shipment."

It seems to us that an unbiased and unprejudiced reading of the testimony of Mr. Sulcove, leads plainly to the conclusion that all of the steel ordered, with the exception of the last items on the order, which were to be eight feet each, should be twenty feet long, cut in two. Mr. Sulcove testified that he obtained all his specifications from the camp, and he was asked: "All of those bars were to be twenty feet long, cut in two?" And he answered, "Yes, sir."

If the original order will be examined, it will be noted that the words "Bars 20 feet long cut in two" are near the bottom of the order and immediately prior to the last item on the order, where the specification is for eight foot steel. How could the specification as to the twenty foot length apply only to the 25 bars of 1x2 Dog Hook Steel, when the item

with reference to Dog Hook Steel is about in the center of the order and is followed by a large number of other specifications, and the specification as to the length of the bars is at the bottom or nearly so? Furthermore, how can it be said that the order means that all bars over twenty feet long, should be cut in two; if so, why were the bars that were less than twenty feet long, cut in two? These bars of steel had to be of a certain length and the order itself naturally indicates the length of the bars. If the order had not specified any particular length, the defendants in error would not have known what lengths to ship and might have shipped any lengths they saw fit. But the order as given, specifies that all of the steel, with the exception of the last item on the order, should be twenty feet long cut in two. All of the bars of steel which were actually shipped by defendants in error, were cut in two, although the lengths were not as prescribed by the contract. That we are right in our construction, is further borne out by the original invoice, being Defendant's Exhibit "F", (Rec. p. 166), in which it is stated, towards the bottom thereof and before the last two items, the words, "Bars cut in two". If only the Dog Hook Steel should be twenty feet long cut in two, and the other bars of steel should not be cut in two and could be of any length, then defendants in error have actually shipped us double the amount of the other kinds and descriptions of steel ordered.

It is probably technically true that there is no requirement in the contract that each bar of steel

should be cut in exactly equal parts, or, in other words, that each bar cut in two, should be exactly ten feet long. But the contract does say, specifically and clearly, that the original length of each bar should be twenty feet long and that each bar of such length should be cut in two. We can concede, for the sake of the argument, that if defendants in error had actually shipped us bars of steel twenty feet long, cut in two, but that the individual bars so cut in two were not exactly ten feet long, that we would have no complaint to make. However, that does not militate against the force and logic of our position that defendants in error could not ship us bars of steel of any greater length than twenty feet. As shown by Exhibit "E" (Rec. p. 164), or inferentially by the summary shown as Exhibit "G" (Rec. p. 168), the 3 bars of 1½x2½ Swivel Steel, shown on the first item of the order, were 25 feet in length, the next bars were 24 feet long, the next bars were 29 feet long, the next bars were 24 feet long, the next bars were 19 feet long, the next bars were 28 feet long, the next bars were 24 feet long, and so on. The two bars of 2 inch Round Piston Rod Steel were each only 15 feet long.

Will anyone contend that this is even a substantial compliance with the contract sued on? If defendants in error had the privilege and right, in the face of the order, to send us bars of steel of the lengths above given, why were they not at liberty to send us bars of steel 35 feet long and cut them

in two, and thereby not only fail in sending us what was actually ordered, but also succeed in swelling the order to that extent?

Opposing counsel state on page 22 of their brief, that there was no evidence to show that the lengths required by the contract were given for the particular purposes of defendant's camp; that the record does not show that the length was at all material. It appears from the testimony of Mr. Sulcove on page 20 of the Record, that he went to camp for the purpose of getting the kinds and sizes of the steel and also the length of the bars, and that he received all his specifications, and more particularly the specifications with reference to length, from Mr. Kline and Mr. Brown, the Superintendent and Head Machinist of the camps. Now the order shows that all of the bars were to be twenty feet long, and this is a matter which is descriptive of the subject matter. The contract itself is conclusive on the question. Oral testimony on the trial, that this was a material part of the contract, would have been entirely inadmissible.

A purchaser ordering goods of a certain kind or description, need not prove why he wanted goods of the kind or description ordered, or how material it was that he have goods of the kind and description ordered. A seller accepting such an order, must fill the order as given and cannot excuse himself for non-delivery by attempting to prove that the goods

shipped to the purchaser satisfied the purchaser's needs as well as the goods which were actually ordered by him.

The specification that these bars of steel should be twenty feet long cut in two, was, as said by the Supreme Court of the U. S. in Pope vs. Allis, 29 Law Ed., p. 393, a part of the description of the thing sold which became essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted.

It is a question of what the parties bargained for and whether or not the seller delivered to the purchaser what the latter actually bargained for.

The only testimony upon which opposing counsel rely to prove that the steel shipped complied with the contract, is the testimony of Mr. Neumeyer, when he testified on direct examination, that the goods were shipped exactly in accordance with the order. (Rec. p. 22.) We have already analyzed his testimony in our opening brief and shown that Mr. Neumeyer had no knowledge on the subject whatever. To emphasize our argument, we might call attention to the fact that it was shown on the trial that this steel was shipped in two shipments; that twelve bars of steel were shipped from Seattle on May 12th, 1913. (Rec. pp. 66 & 67; Plff.'s Exh. No. 12, Rec. p. 127.) Mr. Sharp, the agent of the Northern Pacific Railway Company at Hoquiam, who testified for plaintiff in error, evidently had no know-

ledge that this second shipment of steel had any reference to the first shipment whatsoever. Opposing counsel, upon learning that the missing twelve bars had been shipped by a second shipment, immediately sent a telegram to Mr. Sharp, and he immediately answered by saying that the twelve bars had arrived on May 14th and had been delivered to the Hoquiam Livery & Transfer Co. on that day. It will be remembered that the date is May 14th, 1913. Mr. Neumeyer was not in Hoquiam until the fall of that year; so that when he testified that he saw the steel all piled up in the warehouse in Hoquiam, and that the steel was shipped in accordance with the order, it will be seen at a glance, that he was merely testifying on an assumption that his firm had actually filled the order as given. Neumeyer did not miss the twelve bars then and knew nothing of these twelve bars until the evidence on the trial developed that twelve bars were missing, all of which, as is evident from opposing counsel's brief, was the cause of much consternation on their part during the trial of the cause.

II.

THE QUESTION OF SUBSTANTIAL COMPLIANCE.

Counsel for defendants in error contend that the rule of substantial compliance applies to a contract of this character. They say that the original common law rule required a strict and literal per-

formance as a condition precedent to recovery, but that the modern rule permits recovery upon showing a substantial compliance. This statement is probably correct when applied to building contracts or contracts in general. By the very nature of things, it can have no application to the case of sales, where goods are purchased and sold under a particular description. It is true now, as always, that if I purchase personal property under a particular description, I am not obliged to accept the same unless the goods tendered are according to the description; in other words, I am not obliged to take something that I did not order.

As stated by Lord Blackburne in the case of Bowes vs. Shand, cited in our opening brief on page 33:

> "If the description of the article tendered is different in any respect, it is not the article bargained for and the other party is not bound to take it."

If I bargained for 100 bushels of wheat, I am not obliged to accept 99 bushels. If I order 6 pairs of shoes, I am not obliged to accept 5 pairs. If I order bars of steel 20 feet long, I am not obliged to accept bars 29 feet long, 24 feet long, 22 feet long or 15 feet long. A specification as in the case at bar, that bars of steel ordered should be 20 feet long, is descriptive of the subject matter and is to be regarded, as stated by the U. S. Supreme Court in the case of Norrington vs. Wright, page 31 of our opening

brief, as a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

The rule laid down by the U. S. Supreme Court in the case of Brawley vs. U. S., 6 Otto, 168, quoted in our opening brief on page 28, has never been changed and is the law today.

In this connection see also the following cases:

Hadley Dean Plate Glass Co. vs. Highland Co., 143 Fed. 242.

Brunswick vs. E. Point Milling Co., 74 S. E. 448 (Ga. 1912.)

J. A. Ruhl Clothing Co. vs. Swigleton, 143 S. W., 529.

Greenbrier Lbr. Co. vs. Ward, 36 W. Va. 573; 15 S. E. 89.

Brass Dry Goods Co. vs. Granite City Mfg. Co., 39 S. E., 471.

The Supreme Court of the State of Washington, in the case of Springfield Shingle Co. vs. Edgecomb Mill Co., 52 Wash., 620; 101 Pac. 233, affirms the general rule for which we contend, in the following language:

> "But the theory of this case is, that the sale of an article as being of a particular description, does imply a contract that the article sold is of that description, a doctrine that is supported by abundant authority both in this

> country and in England; and this rule is founded, not upon any theory of warranty, either express or implied, but rather upon the theory of condition broken; and if the action be one brought by the vendor to recover the price of the article sold, the tender of an article answering the description is a condition precedent to the recovery; and if this condition be not performed, the vendee is entitled to reject the article, or if he has paid for it, to recover back his money."

The case of Taylor vs. Ewing, 74 Wash., 214, is not in point, as it has absolutely no application to the sale of personal property by a particular description.

The case of Woodruff et al vs. Hough, 91 U. S., 596, involved a building contract, as did also the case of Pitcairn vs. Phillip Hiss Co., 113 Fed., 492.

We admit that in the case of building contracts the rule of substantial compliance applies; but, as before stated, there is a very wide and clear distinction between building contracts and the sale of personal property by a particular description.

The case of building contracts and contracts of a like nature, is a well recognized exception to the general rule, and the reasons for the exception are well stated by the Supreme Court of the State of Wisconsin in the case of Henry A. Foeller vs. John F. Heintz, 118 N. W. 543; 24 L. R. A. (N. S.) 327, and note.

See also Mortimer vs. Dirks, 57 Wash., 402-404; 107 Pac. 184.

The rule laid down in 3 Page on Contracts, Sec. 1385, quoted on page 34 of opposing counsel's brief, has no reference to the subject of sales, but applies to contracts in general.

The only case which learned and industrious counsel for defendants in error have been able to find, which in a measure supports their contention, is the Texas case of Richardson vs. Herbert, 135 S. W. 628. The facts of that case, however, are not given, and the court mainly relies upon the case of Linch vs. Paris Lumber & Grain Elevator Co., 80 Tex., 23; 15 S. W., 209, to suport the conclusion reached by it. If that case will be examined it will be found that it involves the performance of a building contract. After quoting from this Texas case, the court in the principal case says:

> "The opinion in the Texas case was in regard to a charge similar in terms to the one in the case at bar and is supported by the consensus of opinion in the United States."

Cases from Arkansas, California, Iowa, Maine, Minnesota, Michigan, Pennsylvania and Wisconsin are then cited. We have examined all of these cases and we find that they are all cases involving building contracts and not one of the cases has to do with the purchase of personal property of a certain kind and description.

It seems to us that this case, therefore, cannot be considered as an authority. That the case is not

a well considered one is shown further by the following quotation from the opinion:

> "A literal compliance such as appellants demand would vitiate the contract if a tie should fall short the hundredth part of an inch in dimension, or if there was an infinitesimal portion more of sap than was specified in the contract."

The court seems never to have heard of the Latin proverb, "De minimis non curat lex," or, "The law does not concern itself about trifles."

If the rule is as contended for by counsel, in a case such as the one at bar, it seems strange that with opposing counsel's known ability and industry, they should not have been able to find a case which supports their position. But assuming, for the sake of the argument, that the doctrine of substantial performance applies to cases of this character, it must necessarily follow that substantial compliance and strict compliance are one and the same as applied to such cases. In other words, in cases of this character, a substantial compliance must be a strict compliance, otherwise a purchaser would have no assurance that he was getting what he bargained for.

But taking opposing counsel's view of the law on this subject, let us see whether the contract has been even substantially complied with. It must be conceded that the bars of steel ordered were to be 20 feet long. It is shown by the uncontradicted testimony in the case, and more particularly by Defendant's Exhibit "E", (Rec. p. 164), that the great ma-

jority of the bars sent were much more than twenty feet long. The first bars of steel shown on the order were 25 feet long, the next bars were 24 feet long, th next 29 feet long, the next 24 feet long, the next 19 feet long, the next 28 feet long, the next 24 feet long, etc. Can it be reasonably contended that when bars 20 feet long are ordered, that it is a substantial compliance with the contract to ship bars of the length above stated? It seems to us that the question carries with it its own answer. We can put it another way, by saying that there were shipped 523 feet of steel more than was ordered, which made into bars 20 feet long, makes a total of more than twenty-six bars or about 15 per cent more than the order calls for, (R. p. 49).

This does not take into account the excess length of the twelve bars shipped in May, of which we have no record. By referring to the order it will be noted that there were ordered seven bars of 1¼x4½ Round Choker Hook Steel. Only two bars, or one bar cut in two, were actually shipped in the first shipment, leaving twelve bars, or six bars cut in two, which were shipped in May. By referring to Defendant's Exhibit "G" it will be noted that the one bar cut in two shipped in the first shipment, had an excess length of 5 feet 5¾ inches and an excess weight of 106 pounds. We have a right to assume that the bars shipped in May were substantially like those shipped in the first shipment, so that we have 30 feet additional excess length and 936 pounds excess weight. The 523 feet, which does not include the

the 30 feet excess length of the May shipment, had a total weight of 2709 pounds. The total weight of the entire shipment, including both shipments as shown by the invoice, (Deft.'s Exh. "F"; Rec. p. 166), amounts to 30,910 pounds. For our figures to be correct, we should deduct from this the excess weight of the twelve bars of steel shipped in May, because we are not taking in account the excess length of that shipment. This makes the actual weight of the goods actually shipped in the first shipment, approximately 30,000 pounds. The 523 feet had a total weight of 2709 pounds. Taking the difference, we find that the shipment should not have weighed more than 27,291 pounds, so that the percentage of overweight is 10 per cent. Figuring the matter in dollars and cents, if we add the 936 pounds overweight in the May shipment, to the 2709 pounds overweight in the first shipment, we would have a total overweight of 3645 pounds, which at 12½ cents a pound, amounts to $455.62. This is considerably more than 10 per cent of the entire purchase price. In our opening brief, on page 19, we gave the figures as $338.62, but we did not take into account the excess weight in the May shipment. Even if we look at the case from the standpoint of an ordinary building contract, or contracts of a like character, and of the rule of law applicable to the performance of such contracts, we find that the authorities would not sustain the contention that the contract had been even substantially complied with.

As shown by the authorities in our opening brief, this is not a defense **pro tanto**, but it is a matter that inheres in the very nature of the contract and is a complete defense to the action.

III.

THE QUESTION OF WAIVER.

It will be well, in the discussion of this question, to advert to a few facts. The order was given in September, 1912. Plaintiff in error testified that no acknowledgment of receipt of the order was sent by defendants in error to them. Plaintiff in error received the invoice, being Defendant's Exhibit "F" (Rec. p. 166) about February 17th, 1913. Mr. Robt. Polson, the manager of plaintiff in error, testified that the first he heard of the order or claimed order, was in February, 1913, when the invoice was received at the office; that he looked over the order and found it so strange that he looked through all the office records to find if there was any copy or any record of any such order, and he found none; that he questioned Mr. Shaw about the order and Mr. Shaw stated that he had given no such order; that witness has general charge of the camps and is a practical logger, having been in the business since 1894, and that his company at no time ever purchased even a quarter of a carload of steel, but purchased only a few bars at a time; that they have a warehouse in the back of their office at Hoquiam, in which they keep the tool steel, and this supply is always kept up by buying a few bars at a time; that the quantity of steel shown on the order is sufficient to last the company for a good many years to come. (Rec. pp. 64 & 65.) Mr. Alexander Polson, the president of plaintiff in error, testified substantially

as his brother, Mr. Robt. Polson, and testified further that the first his company learned of any discrepancy in the kind, character and description of the steel sent, with that specified in the order, was shortly before the trial and after Mr. Mills and Mr. Flurshutz had measured and weighed the same. The order was rejected on February 19th. After receipt of the invoice quite a number of telegrams and letters passed between plaintiff in error and defendants in error. The first telegram was sent by the Polson Logging Company on February 18th, in which they acknowledge receipt of the invoice for the steel and state there must be some mistake. (Plff.'s Exh. No. 2; Rec. p. 116.) Again on February 19th the Polson Logging Company wired defendants in error that there was no record of the order in the office and that they must prove that the order is not a forgery or obtained by fraud; that they would not accept the order. (Plff.'s Exh. No. 7; Rec. p. 121.) The defendants in error were again notified that the shipment would not be accepted by Plaintiff's Exhibit No. 3; Record p. 117; again by Plaintiff's Exhibit No. 4, which is a letter dated March 22nd, Record p. 118. As shown by Defendant's Exhibit "I", the steel actually arrived on March 11th, 1913, and after the passing of the letters and telegrams above referred to. (Rec. p. 183.) When the steel arrived it was refused on account "not ordered". (Deft.'s Exh. "A"; Rec. p. 131.) It will be noted, as stated in our opening brief, that the invoice and the bills of lading only show the number of bars shipped,

and the invoice, in addition, show the weights, not of each particular bar of steel, but the total weight of each kind of steel shipped; but they are silent as to the length of the bars. Plaintiff in error had no information whatsoever with reference to the lengths until shortly before the trial and while they were preparing for the defense of the case. It will be noted also, in this connection, that the shipment was refused because it was claimed that the order never was given, and this defense also was continued throughout the trial in the lower court. Opposing counsel say on page 7 of their brief, and Mr. Anderson also argued before this court on the oral argument, that the steel was refused because the sizes were not correct. There is no such testimony in the record. The only reference to sizes is in a letter from the Polson Logging Co. to the defendants in error in which they refer to a number of sizes shown on the order, saying that they were sizes never used by them in their camps, and that such fact would be sufficient to the mind of any reasonable person, that the order had never been given. This reference to sizes was merely referred to as an argument to show that the steel had actually never been ordered by them. (Deft.'s Exh. "J"; Rec. p. 184.)

Upon these facts the question arises as to whether or not we are now estopped from taking the position that defendants in error have not complied with their contract.

In discussing this question, it first occurs to us,

that defendants in error, suing, as they do, on an executed contract, must prove a compliance therewith, or a waiver on the part of the buyer to a performance on their part of certain terms of the contract. If defendants in error rely upon a waiver, it would have been necessary for them to set up in their complaint, that performance of the contract in certain particulars had been waived and submit proof of this allegation. This has not been done.

A leading case on the question of waiver, is the case of List & Sons Co. vs. Chase, found in Vol. 80 of Ohio St. Rep. on page 42, decided on March 9th, 1909; also found in A. & E. Ann Cases, Vol. 17, p. 61. The plaintiff in that case brought suit to recover for the defendant's failure to accept a shipment of eggs, which plaintiff claims the latter had ordered. The plaintiff alleges a performance of all the conditions of sale on his part. The answer was first a general denial, and then an affirmative defense setting up what the contract was, and alleged breach thereof, in that the goods were not shipped on time; that the eggs were not fresh; that the defendant refused to accept them upon arrival, etc. The court said that the burden of proof remained with the plaintiff to prove the contract and the performance thereof. It appears that the lower court swept aside all questions as to the quantity purchased and as to the route by which the eggs were to be shipped. With reference to this point the court says:

> "A waiver is a voluntary relinquishment of a known right. It may be made by express

> words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. Mere silence will not amount to waiver where one is not bound to speak. * * * It is true that if the contract bound the plaintiff to ship by such a route, the defendant might have rescinded the contract on receiving the bill of lading showing a shipment on another and more hazardous route; but he was not bound to do so then. He might wait until inspection, because inspection might show that the goods were not damaged, and he could then accept them, or if damaged, reject them. The same was true as to the quantity of eggs purchased. The purchaser was at liberty to accept all the eggs shipped to it, although in excess of the amount which it agreed to buy, or it might have accepted out of the excess shipment, the quantity which it agreed to buy; but it was not bound to do either (Mechem on Sales, Sec. 1157-1161) and when it rejected the whole shipment it did not put the plaintiff in any worse position, for upon the hypothesis that the contract was as defendant claims, the plaintiff had already failed to perform his part of the contract."

It was claimed that because the defendant had sent to the plaintiff a telegram assigning only one reason for refusal to accept the same, to-wit: "That the eggs did not stand inspection", it waived all other grounds. The court said:

> "We do not deny that under some circumstances a refusal to accept goods for a stated reason, may operate as a waiver of other objections, which might have been properly made. This may be so in cases where the silence of the purchaser and his conduct operate to mislead

the seller and prevent him from protecting himself; in other words, where the contract of the buyer would raise an estoppel against him. See Johnson vs. Oppenheim, 55 N. Y., 280-291; Smith vs. Pattee, 70 N. Y., 16 & 17. But when the buyer has absolutely rejected the goods for whatever reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor, cannot be construed as a waiver of the buyer's right to insist on his plea of non-performance on those grounds. The reason which underlies this proposition is, that a waiver must be voluntary, that is, intentional, with knowledge of the facts and of the party's rights, or it must be implied from conduct which amounts to estoppel. Therefore since it does not appear in this case that the defendant when it notified the plaintiff that it refused to accept the eggs for inferior quality, intended to waive objections as to quantity and change of route, or that the failure to notify plaintiff of those objections in any material way, misled or prejudiced the plaintiff, a waiver of such objections cannot be implied.

"Moreover the plaintiff stands upon his averment that he has performed all the conditions precedent on his part. If he would show a waiver of conditions he must aver it as an excuse for non-performance of such conditions. Eureka Insurance Co. vs. Baldwin, 57 N. E. 57."

There are many cases cited in the note to the above case, all of which cases counsel has reprinted in his brief, and which are shown on pages 46, 47, 48 and 49 thereof. All of these cases hold that where a purchaser refuses to accept goods and bases his refusal on a particular ground, he thereby waives

other objections which he might have urged for such refusal; but in all those cases it was apparent that the purchaser had examined the goods and was fully acquainted with the breach on the seller's part, of the contract, and only rescinded the contract on stated grounds.

The court lays down this important exception to the general rule, as follows:

> "The general rule is subject to the important exception that the purchaser by asserting a particular ground of objection is not deemed to waive objections of which he has no knowledge at the time of his refusal to accept the goods."

See: Kalamazoo Corset Co. vs. Simon, 129 Fed. 144.

Tascott vs. Rosenthal, 10 Ill. App., 639.

Newberry vs. Furnival, 56 N. Y., 638.

Brown vs. Bard, 118 N. Y. Supp., 371; 64. Miscl. 249.

Perry vs. Mt. Hope Iron Co., 16 R. I. 318; 51 Atl. 87.

The syllabus of the latter case reads as follows:

> "Where the buyer refused to accept on the sole ground that the goods were shipped too late and received the invoice showing grounds of refusal, he did not waive such other grounds by basing his refusal on the ground first stated."

In the case of Tascott vs. Rosenthal, supra, the court said:

> "But it is insisted by appellees that appellants waived their rights to object to premature shipment, by placing their subsequent refusal to accept on the ground that the brushes did not seasonably arrive. We are unable to coincide in this view. By shipping the goods before the time agreed upon appellees committed a breach of their contract and such breach was not occasioned by any act or omission on the part of appellants. Appellees at the time of the breach were not misled by any supposed waiver of the condition in relation to the time of shipment, and because appellants subsequently, under an erroneous belief that the delay in the arrival of the goods was caused by a failure to ship them in time, complained that they had not arrived in season, and assigned that as a reason for refusing to accept them, it by no means follows that this constituted a waiver. And even had appellants known all the facts it would not alter the case for the portion of the condition of the contract in respect to the time of shipment was already completed, and appellees could maintain no action on the contract whatever reasons appellants might thereafter assign for refusing to accept the goods, or though they should assign no reason." 7 Ad. & E. 650.

In the case of Bryant vs. Thesing (Nebr.), 64 N. W. 967, it appeared that defendant had not refused to take the nursery stock because the trees were not budded, but assigned as a reason for his refusal to receive it, his discharge by a subsequent oral agreement. The court, after stating the rule to be that plaintiff was obliged to prove a compliance

of the contract on his part and a sufficient tender of the nursery stock ordered, said:

> "It appears from the evidence that the defendant did not refuse to receive the stock because not of the kind ordered; but when the jury had determined from the evidence that the trees were not of the kind ordered, as they must have done before they could conclude, as they were informed, that defendant had a right to refuse the stock, the defendant would be entitled to a finding in his favor for the failure of the plaintiff to deliver or tender that which was ordered."

See also the case of J. A. Coats & Sons vs. Huffine (Ind.) 41 N. E., 465, which was a much stronger case for the plaintiff than the case at bar, but where the defense was allowed.

The case of Nelson vs. Imperial Trading Co., 69 Wash., 442-446; 125 Pac. 777, seems to be decisive of the question. That case involved the delivery of a quantity of turkeys. The principle of waiver was discussed, and the court quoted with approval the rule as laid down in 40 Cyc., 261-263, as follows:

> "The question of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby. * * * Mere silence at a time when there is no occasion to speak is not a waiver, nor evidence from which waiver may be inferred; especially where such silence is unaccompanied by any act calculated to mislead."

Applying the rule laid down by the Supreme Court of the State of Washington, to the case at bar, wherein have we any facts to support a waiver? There is nothing in the record which discloses any intention on the part of plaintiff in error to waive the discrepancies in the lengths of the bars. The steel was not examined and the facts with reference to the kind of goods shipped, were not learned until a week or such a matter before the trial of the cause. The allegation in plaintiffs' complaint that they had delivered goods of the kind, character and description called for by the contract and in accordance with the contract, was expressly denied. The question of the length of the bars, after the order was given, was never the subject of conversation or correspondence between the parties, and there is not a scintilla of evidence in the record, or elsewhere, that defendants in error were misled in any way, shape or manner. On the contrary, defendants in error have always taken the position, and now take the position, that they have complied with their contract. Furthermore, plaintiff in error could not waive something of which it had no knowledge, and a waiver is a voluntary relinquishment of a known right. We can probably make ourselves clear by an illustration: The contract provides that the goods should be shipped f. o. b. Hoquiam. The freight bill shows that the freight on the shipment from Seattle to Aberdeen, was not paid. This was a matter that probably was apparent to plaintiff in error at the time of the arrival of the goods in Hoquiam. It

would probably be true that we could not now defend on the ground that the freight had not been paid.

The case of Peterson Bros. vs. Mineral King Fruit Co. (Cal.) 74 Pac., p. 163, is typical of the cases which are cited by counsel for defendants in error. That was a case of the sale and purchase of certain prunes. At the time the prunes were tendered they were refused upon the ground that the prunes were not sound and merchantable and of the kind ordered and were not properly cured, but no objection was made as to the time, place and manner of delivery. It was rightfully held that these last objections had been waived because the purchaser must have had knowledge of these facts at the time he made his objection to the prunes tendered.

So also in the case of Ginn et al vs. Clark Coal Co., 143 Mich., p. 84; 106 N. W. 867; 107 N. W. 904. The defendant in that case made a full examination of the coal over which the litigation arose and notified plaintiffs that they rejected the same for a certain specific ground, namely: the coal was not Pine Grove coal. It was therefore held that the defendant was not in a position at the trial to rely upon the defense that the coal was not of a merchantable quality.

The same condition existed in the case of Littlejohn vs. Shaw, 159 N. Y. 188; 53 N. E. 810.

In all those cases the defendant had actual knowledge of the failure on the part of the plaintiff to comply with his contract in certain particulars, and based his refusal to accept the goods tendered upon a specific ground or grounds, and it was held, therefore, that the defendant had waived all other grounds of which he had knowledge. These cases can be widely distinguished from the case at bar.

Counsel argued before this court, that we should have gone to the freight depot and examined these goods, and then notified defendants in error of their failure to perform the contract. In other words, he argues that we should have known of the defendants' failure to perform their contract. This argument is not reasonable. Long before the goods actually arrived in Hoquiam, the plaintiff in error took the position that defendants in error had no valid order for these goods, and plaintiff in error, in good faith, maintained this position at all times and throughout the trial in the lower court. That defense is not urged in this court for the simple reason that we feel, as stated in our opening brief, that the question of fraud had been properly submitted to the jury and that the jury had found against us on this issue. Having taken the position that the goods were not ordered, it certainly would be illogical, not to say unreasonable, to expect plaintiff in error to examine the goods when they arrived in Hoquiam and then notify defendants in error that the goods did not comply with the contract. The law will not require such an absurdity. Defendants

in error were not misled by anything that was said or done by plaintiff in error. They kept the contract alive for the benefit of both parties and contented themselves to stand upon the ground that they had completed their contract and were therefore entitled to recover. There is no absolute duty of inspection that devolves upon a purchaser, as the purchaser can either reject or accept the goods without inspection and without assigning any reason therefor. It follows, therefore, that the defendant might have rejected the goods when they came here, without inspecting the same and without assigning any reason for the rejection, and on suit brought could prove on the trial that the goods were not according to the contract. In the case at bar, the goods themselves were not rejected for any specific reason that attached to the goods. The shipment was rejected because it was claimed that the goods were not ordered. If a purchaser does not reject goods shipped him, within a reasonable time after arrival, he is conclusively presumed to have accepted the same, and if the goods are not according to contract, the purchaser can only recoup in damages in an action for the price. So in this case, the steel was absolutely rejected before arrival, upon the ground that the same was not ordered. Inspection on arrival was neither necessary nor proper under the circumstances, and plaintiff in error, having no knowledge of any failure on the seller's part to perform his contract, could not waive the same. Defendants in error had the opportunity on the trial of the case in the lower

court, to show, if they could, that they were misled by any action that plaintiff in error may have taken or failed to take, but this they did not do. On the contrary, they have always insisted and now insist, that they have fully complied with their contract. If, therefore, the question of waiver is based on the equitable ground of estoppel, wherein can it be claimed that the plaintiff in error has waived any rights?

CONCLUSION.

In concluding, we desire to take exception to the statements made in the brief of opposing counsel on pages 54 and 55. Counsel intimates that we knew all the time that the twelve bars of steel which had been shipped from Seattle at a subsequent shipment, had been so shipped, and that we attempted to deceive both court and jury with reference to this matter. The Polson Logging Company is a large concern and has operated in the City of Hoquiam in the State of Washington, for a good many years, and there is no more reputable concern on the Pacific Coast or elsewhere. Mr. Polson testified that he had absolutely no knowledge of this second shipment of steel and that the first that he heard of it, was when it was testified to in rebuttal. Even Mr. Sharp, the agent for the Northern Pacific, had no knowledge that this second shipment had anything to do with the first shipment, as this second shipment was immediately delivered to the Hoquiam Livery & Transfer Co.

Counsel further intimates that we have taken these twelve bars of steel without paying therefor. There is no testimony in the record that we have these bars of steel, and we say with all the earnestness at our command, that these bars of steel were not received by us and we have absolutely no knowledge thereof. Counsel's insinuations are entirely uncalled for and unjust and we believe that if opposing counsel, for whom we have the greatest respect, both for their ability and integrity, had given the matter a second thought, they would not have made these insinuations, or attempted to grasp at something which is entirely outside of the record.

We believe that our position is right and that the case should be reversed.

T. B. BRUENER & J. B. BRIDGES,
Attorneys for Plaintiff in Error.